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No. 790

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

BRASWELL MOTOR FREIGHT LINES, INC., ET AL,
Appellants

vs.

UNITED STATES OF AMERICA, ET AL, *Appellees*

On appeal from the United States District Court for the Western District of Texas.

Appellants' Reply to Motions to Dismiss and to Affirm

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Appellants' Reply to Motions to Dismiss and to Affirm

The United States, Interstate Commerce Commission, and Pacific Intermountain Express Co., et al, have filed motions to affirm and Transcon Lines has filed motion to dismiss. This is in reply to all motions, each of which is without merit.

In the following statement and argument we propose to bring the deficiencies of the Commission's order, based upon its own decisions and under statutory standards, demands, and the National Transportation Policy, into sharp focus. For the questions presented are important. And so far as we can find, this Honorable Court has never been faced with the questions as here presented.

Moreover, the basic findings essential to the validity

of a given order will vary with the statutory authority invoked and the context of the situation presented.[1]

STATEMENT WITH ARGUMENT

This is a direct appeal from a final judgment of a statutory three judge District Court (Juris.Stmt., Appendix A). The Commission approved, in part, as consistent with the public interest, the purchase by Braswell Motor Freight Lines, Inc. (hereinafter called Braswell), of the operating rights and certificates of convenience and necessity owned by the Warren G. Shayler Estate, Clarinda K. Shayler, Executrix, the surviving spouse and sole heir, and W. Thurman Shayler, Guardian of his now long deceased father (all hereinafter called Shayler). The Commission refused, however, to permit joinder of the Braswell and Shayler end-to-end certificates at Oklahoma City to the extent that such joinder would permit the rendering of single-line service to Phoenix, Tucson and Yuma, Arizona, and to Los Angeles, California. We believe the trial court merely "rubber-stamped" the Commission without coming to grip with the issues and the questions here presented.

That refusal of joinder is the extent to which appellants challenge the Commission's order.

For the Examiner's findings as summarized by the Commission, see Appendix B, Jurisdictional Statement, pages B-5 and B-6. The Commission adopted

[1] *Alabama Great S.R.Co. vs. United States*, 340 U.S. 216, 228, and authorities there cited.

the findings of the Examiner to the following extent only:

The findings of fact, insofar as they relate to the *financial condition* of applicants, the *terms* of the proposed transaction, and *the operations of protestants, as set forth in the Examiner's report* "are adopted as our own without being restated . . ." (Juris.Stmt., Appendix B, page B-4).

This, as a matter of course, *left all* other *essential* findings on all other material issues to be made by the Commission.

The Commission did not make such other essential and material findings and the reasons therefor in the respects complained of. 5 U.S.C. 1007(b). This is patent on the face of the order and fatal thereto.

The Commission ignored the National Transportation Policy. This is patent on the face of the order.

The Commission has made clear the factors or elements that *must be considered* in a Section 5, acquisition, proceeding. They are: *"We must find;"*

(1) "That it will be consistent with the public interest, a concept which;"

(2) "Has direct relation to adequacy of transportation service;"

(3) "To its essential conditions of economy and efficiency;"

(4) "To appropriate provision and best use of transportation facilities;"

(5) The "interest of competing carriers;" and

(6) "That of shippers and consignees."

And the Commission explained that:

(1) It "*is our duty* to consider the effect which a proposed *new unified* service will have on the continuance, efficiency and economy of existing carrier services;"

(2) "If such proposed new unified service would adversely affect to any substantial extent the continuance, efficiency and economy, to the detriment of the public;" then,

(3) "Whether it would result in offsetting advantages to the public;" and,

(4) "Whether approval or disapproval would more nearly conform with the policy of Congress declared in the national transportation policy."

Pacific Intermountain Express—Control—Keeshin, 57 M.C.C. at page 470.

The foregoing is a fair and accurate summation of the requirements of Section 5(2)(b) and (c) of the Interstate Commerce Act, *49 U.S.C. 5(2)(b) and (c)*, in the light of the demanding standards of that statute, of Section 8(b), *5 U.S.C. 1007(c)*, and of the National Transportation Policy.

In the case at Bar the Commission in denying unification, to the extent here complained of, *gave no consideration* to the relevant elements which it said "*We must find.*" We verily believe, as the Commission so said, that it "must" or that its order is void.

The Commission here, first, noticed what it called "an infinitesimal" amount of interline business (Juris. Stmt., Appendix B, page B-26); second, Braswell's "stronger financial condition" and the possibility "in all likelihood (to) increase, the amount of traffic now being handled under temporary authority" (Juris. Stmt., Appendix B, page B-26); and denied the unification, to the extent complained of, by concluding: "In our opinion the record here is clear that approval of the instant transaction would have a substantial adverse effect upon existing carriers operating from and to points in Arizona and California and our findings will be conditioned accordingly." (Juris.Stmt., Appendix B, page B-27).

The Commission addressed itself to no other elements essential to determination as it said "*We must* (do) *find.*"

In the light of Section 5(2)(b) and (c) and the National Transportation Policy, there is utter failure of compliance with Section 8(b), Administrative Procedure Act, *5 U.S.C. 1007(b)*, last sentence.

And the finding quoted next above is not only not supported by substantial evidence but is positively contrary to the evidence. Said finding runs squarely afoul of Section 8(b), *5 U.S.C. 1007(b)*, and Section 10(e) of the Administrative Procedure Act, *5 U.S.C. 1009(e)*. As to Section 10(e), it is particularly violative in the following:

> "10(e). So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitu-

> tional and statutory provisions, and determine the meaning or applicability of the terms of the agency action. *It shall* . . . (B) *hold unlawful and set aside* agency action found to be (1) *arbitrary, capricious, an abuse of discretion* or otherwise not in accordance with law; . . . (5) *unsupported by substantial evidence* in any case subject to the requirements of sections 1006 and 1007 of this title . . . (6) *unwarranted by the facts* . . . In making the foregoing determinations the court shall review the whole record or such portion thereof as may be cited by any party, and *due account shall be taken of the rule of prejudicial error.*" (Emphasis supplied)

The facts with reference to the foregoing statutory requirements are, taking them in a somewhat inverted order, that:

(a) The only tangible, reliable and undisputed evidence shown at the time of hearing is that Braswell had been operating in competition with intervening appellees for the period March 18, 1963, to date of hearing, beginning November 4, 1963. From *the record evidence* the Examiner compared operating ratios of protesting motor carriers for the year 1962 with their operating ratios for the first three quarters of 1963, during which three-quarters (or most of them) of those protestants, including appellees-intervenors here, *and found no adverse effect.* Based upon the record as a whole, there was *none.* See Juris.Stmt., page 16, footnote 3, collated from the evidence. Appellees-intervenors' operating ratios were just as good, and in some instances better, with Braswell's competition,

as without it.[2] This clearly established no adverse effect.

From the entire *record evidence, only one conclusion* can be drawn, i.e., the Commission's finding, as quoted above and to which this is addressed, *is false.* It is not supported by substantial evidence. The evidence establishes the contrary. And it comes within the statutory condemnation of Section 10(e)(B)(1), (3), (5), (6), and the last sentence of said section setting out the "rule of prejudicial error." The order is void and must be set aside.

The Commission *never* addressed itself to other elements essential to adjudication as it says *"We must"* in *Pacific Intermountain Express, Co.—Control—Keeshin,* 57 M.C.C. at page 470. For this the Commission and its order are condemned by Section 8(b), Administrative Procedure Act, *5 U.S.C. 1007(b),* last sentence. For this the order is void and must be set aside.

Remember that the Commission adopted the *findings* of the Examiner *in respect to only three findings,* to which we have heretofore directed the Court's attention.

Moreover, since the Commission's finding, discussed next above, was obviously untrue, seemingly it should have wanted to buttress said finding by taking official notice of its own records, prepared by and filed with the Commission by the intervenors themselves. *49 U.S.C. 320(a).* For remember that at the time the Commission was writing it had available to it, not just three-quarters of 1963 but the full year, and in

[2]See Exhibit H-54 attached hereto as *Appendix A.*

addition all of the year 1964 and three-quarters of 1965. Means for positive determination were at the Commission's finger tips. It preferred to exercise its expertise by pure speculation. Its speculative forecast could have been confirmed or the positive contrarity determined. The Commission chose the course of "prejudicial error." Section 10(e), Administrative Procedure Act, last sentence.

Failure of the Commission to make all essential findings, and it certainly failed as we have clearly pointed out, condemns its order as void under Section 8(b), Administrative Procedure Act, as well as Section 10(e) thereof, along with the misapplication of prescribed criteria (standards) and the demands of the National Transportation Policy.

The Commission did discuss lack of substantial interchange of traffic between appellants herein, and based a conclusion of a new service to Arizona and California points thereon. But interchange of traffic is only one element for consideration in a Section 5 proceeding, *and is not* controlling[3] under standards

[3]See *Virginia-Carolina Freight Lines, Inc.–Control–Burlington Truckers, Inc.*, 87 M.C.C. 341 (344-345), where the Commission points out that there had been no prior interchange and said:

"That Virginia-Carolina and B-T did not interchange traffic with each other before the agreements were signed is not controlling, because they interlined with other carriers shipments moving between points in their respective territories. Compare Consolidated Freightways, Inc., Common Control Silver Fleet, 85 M.C.C. 139. To deny the application or to impose burdensome restrictions merely because the traffic in which B-T participated did not move in all directions, would not be warranted. D. C. Hall Co.–Purchase–Hall and D. C. Hall Transport, Inc., 70 M.C.C. 233. . . . The record warrants findings that protestants are well established carriers in the areas involved and should be able to withstand without undue difficulty the increased competition and possible loss of some traffic as a result of the transaction." (at page 446).

long recognized and established by the Commission itself. Interchange is not even necessarily required.[3] This is because, as explained in the *Virginia-Carolina Freight Lines, Inc.*, case (see quote preceding page), petitioners here "interlined with other carriers shipments moving between points in their respective territories." In *Consolidated Freightways, Inc.—Control—Silver Fleet* 85 M.C.C. 189, the Commission explained its holding in *Keeshin* in connection with what it felt had been a misunderstanding of *Keeshin*.[4]

In that connection the Examiner pointed out (Juris.

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[4] "In view of the foregoing, we believe it is apparent that the carrier protestants have misinterpreted the scope of the findings contained in the *Keeshin* case. While it is true that, as they contend, we found in such proceeding that the lack of substantial interchange between the applicants would have resulted in the creation of a 'new competitive service,' denial therein was based solely upon the adverse effect the transaction would have produced on the services and operations of competing carriers and the absence of any showing that approval of the transaction would result in offsetting advantages to the public.

"The importance in a section 5 proceeding of the factor of the quantum of traffic interlined in the past by applicants pertains entirely to the greater issue of the manner and extent which a transaction will affect the operations of competing carriers. In other words, a substantial interline of traffic between applicants in the past is generally indicative of the fact that existing carriers have already been faced with, and adjusted to, the competition of their joint-line service. Under these circumstances it can be fairly concluded, in most instances, that approval of a transaction would cause little impairment in the existing services of competing carriers. At the opposite extreme, in instances where applicants have not interlined traffic moving between their respective areas of operation with one another or other carriers, it is similarly evident that their unification could readily result in serious disruption of the present competitive balance and the impairment of the operations and services of competing carriers. It should be emphasized, however, that past interchange constitutes only one element in our appraisal of the effects a transaction would likely have upon the operations and services of existing carriers, and, by itself, is not controlling in the determination of the ultimate issue. Compare *Transcon Lines–Purchase–B & M Exp., Inc.*, 75 M.C.C. 693, and also *Transcon Lines–Purchase–Missouri-Oklahoma Exp., Inc.*, 80 M.C.C. 79."

Stmt., Appendix C, page C-24) that appellant-vendor interchanged freight in 1962 at Chicago, St. Louis, Tulsa and Oklahoma City; that "at Tulsa and Oklahoma City was with 22 carriers including Braswell." The record shows this. The Commission also so found (Juris.Stmt., Appendix B, page B-24).

But if proof of "need" was required, as it clearly is not, for other standards or criteria are prescribed,[5] nevertheless the Commission has utterly failed in performance of its duties and obligations to appellants and to the public as well. For appellants presented the evidence of seventy (70) shipper and receiver witnesses, coming from Chicago and St. Louis on the east to Los Angeles on the west.

The Commission did not even once refer to that evidence of record. The Commission simply ignored it. That is plain and simple arbitrarity and capriciousness, condemned by Section 10(e) of the Administrative Procedure Act.

In any event, the evidence of 70 shipper and receiver witnesses put the issue in question, if it was ever properly an issue in a Section 5 acquisition proceeding. It certainly brought into sharp focus the matter of public interest, but the Commission did not weigh the evidence or make the essential and required finding. If it was in issue the testimony of all those witnesses cannot be ignored as was done by the Commission, for Section 8(b) of the Administrative Procedure Act, *5 U.S.C. 1007(b)*, making findings with reasons

[5]It is nowhere even inferentially referred to under the criteria of Section 5(2)(a)(i), (b) or (c) nor in the National Transportation Policy.

therefor mandatory, without which the Commission's order is void. For a reviewing court, Section 10(d), Administrative Procedure Act, *5 U.S.C. 1009(d)*, "*shall* . . . (B) *hold unlawful* and set aside agency action, findings and conclusions," etc. Then follows condemning specifications (1) through (6).

The Commission, not even once, ever weighed the evidence via balancing the equities of existing carriers against the public interest and determining,

(1) Whether approval would result in offsetting advantages to the public; and,

(2) Whether approval or disapproval would more nearly conform with the policy of Congress declared in the National Transportation Policy.

Pacific Intermountain Express—Control—Keeshin, supra.

Again the Commission finds itself on the horns of another dilemma for it not only completely ignored the oral evidence of 70 public witnesses as pointed out above, but it finds itself in a contrarity of opinion in using the fact of Braswell's development of a substantial amount of traffic which it says will have a materially "adverse effect" on existing carriers, *but* in August, 1963, in the *Youngstown Cartage Co.—Control—Bigley Bros., Inc.*, 93 M.C.C. 318, 325, incidentally in which *there had been no prior interchange of freight*, the Commission said:

> "As indicative of operations performed under temporary authority, Cartage submitted an abstract of approximately 950 representative ship-

ments, averaging in weight from 228 pounds to 325,991 pounds, transported in approximately 1 week of each month from March 9, 1961, to February 10, 1962. These shipments originated at two points in Connecticut, one point in Delaware, three in Maryland, two in Michigan, six in New Jersey, eight in New York, eight in Ohio, and seven in Pennsylvania, destined to various points in all of the States authorized to be served by Bigley Bros. The commodities transported consisted of steel, steel products, contractors' equipment, machinery, and building materials. *While the service provided by Cartage under temporary lease operations is not conclusive, evidence thereof is admissible and properly to be considered with other evidence to determine whether the transaction and unified service would be consistent with the public interest.* See *Standard Motor Freight, Inc. — Purchase — Madison Transp.*, 65 M.C.C. 249, and *Ashworth Transfer, Inc.—Pur. —Wilcoxon and Fowkes*, 90 M.C.C. 107."

In the case at Bar and in *Youngstown Cartage* we have the question of application of criteria—standards —Section 207 (*49 U.S.C.* 307); new service, and Section 5(2)(b) and (c) *(5 U.S.C. 5(2)(b) and (c))* acquisition proceeding, with the overriding considerations of the National Transportation Policy.

In *Youngstown Cartage* the Commission says yea but in the case at Bar it says nay.

In *Youngstown Cartage* the Commission says that although the development of substantial business under temporary authority "is not conclusive," nevertheless, such evidence is proper and is to be considered

"to determine whether the transaction and unified service would be *consistent* with public interest." There the unification was authorized. Here it just about frightened the Commission out of its wits.

So here it resulted in that which the Commission is without statutory power to do, i.e., protect existing carriers, contrary to the intent of Section 207(b), *49 U.S.C. 307(b)*. The National Transportation Policy is the overriding Congressional command to the Commission. That policy together with Sections 5(2)(b) and (c) fix the standards or criteria within which the Commission must confine itself, and there is found no requirement for proof of need for the service as is found in a Section 207 application. *49 U.S.C. 307*.

WHAT THE DISTRICT COURT DID

The District Court (of three judges) begins its opinion by quoting what it calls the *"Statutes Involved"* and names as those involved Sections 5(2)(e)(i), 5(2)(b) and 5(13), *49 U.S.C. 5(2)(a)(i), 5(2)(b)* and *5(13)*, along with Section 210a(b), *49 U.S. 310a(b)*.

It does not name as involved Section 5(2)(c) which *directs* the Commission that "*In* passing upon any proposed transaction . . . the Commission *shall* give weight to the following considerations" and names them in (1), (2), (3), and (4) order. It must be assumed, therefore, that the Court gave no consideration to Section 5(2)(c), a direct command from Congress. Section 5(2)(c) was very much involved.

Neither did the Court in its opinion *ever once, not*

even once, refer to the Administrative Procedure Act, Sections 7(d), 8(b) or 10(e), *5 U.S.C. 1006(d), 1007(b)* and *1009(e)*. Nor did the Court ever refer to the National Transportation Policy, the policy which *must* be taken into consideration in all acquisition cases, whether purchase or control.

The Commission's violations and deficiencies in adjudication were the predicate for appellants' attack upon the order. For both the Commission and the Court below ignored or, in any event, utterly failed to consider and abide by statutory criteria—standards—prescribed by Congress. All that either the Commission or the Court did was, in fact and law, to apply the criteria of Section 207, *49 U.S.C. 207*—new certificate, which was utterly wrong and contrary to the Commission's statutory authority.

But Sections 7(d), 8(b) and 10(e), Administrative Procedure Act, were intended to mean something. They were intended to mean just what they say. They were intended to put restrictions upon the Commission's actions and adjudicative power. Appropriate criteria is essential to constitutional delegation of legislative authority, the bed-rock of constitutional delegation of legislative authority.

The cited sections of the Administrative Procedure Act and the National Transportation Policy *were very much involved*. The summation of what the Commission said, "*We must find*" as pointed hereinabove, demonstrates that the cited sections of the Administrative Procedure Act and the National Transportation Policy limit the actions of the Commission in

keeping it within the power delegated to it and form the very basis of the attack upon the order involved herein.

But not so, insofar as the Court below was concerned. The Court below gave no evidence of consciousness of Section 5(c) of the Interstate Commerce Act or of the cited sections of the Administrative Procedure Act.

The Court below in its adjudicative opinion:

First, said that "the evidence before Division 3 established the fact that the service proposed by Braswell from and to points in Arizona and California would constitute a new service not heretofore performed by vendor in conjunction with vendee or any other carrier." (Juris.Stmt., Appendix A, page A-6).

But interchange of traffic is not controlling, as we have pointed out and as the Commission has often held. There is no indication here that the Commission was announcing a new policy or a departure from the principles of the *Pacific Intermountain Express* case, supra, with reference to Section 5(2)(b) cases.

Moreover, the Commission admits there was an interline of traffic.[6] The only record evidence is that such interline had extended over many years. Protesting intervenors-appellees here offered no contrary evidence.

Second, the Court below said that the evidence supports the Commission finding that Braswell "had built

[6]See Juris.Stmt., pages B-23, C-24, C-43, C-51.

a substantial operation to and from Arizona and California." (Juris.Stmt., Appendix A, page A-7). Admitted. However, (1) this is strong, though not conclusive, evidence, in the determination of the question of public interest, *Youngstown Cartage Co.—Control—Bigley Bros., Inc.*, 93 M.C.C. 318, 325; and (2) the only record evidence is undisputed that there had been no adverse effect (Juris.Stmt., footnote 3, page 16; Appendix A hereto attached).

Third, the Court below says that "Since the public interest requires that carriers already in a territory be protected, it is immaterial whether the attempt to invade is made through an application under Section 5 or one under Section 207." (Juris.Stmt., Appendix A, page A-7).

This holding shows prejudicial error, both by the Court and the Commission, in failing to observe and conform to the different standards and criteria fixed in Section 207, *49 U.S.C. 307*, from those fixed by Sections 5(2)(c) and the National Transportation Policy. Failing to recognize the *different* standards or criteria is fatal and specifically condemned by Section 10(e)(B)(1), (2), (3) and (4), *5 U.S.C. 1009(e)(B)(1), (2), (3) and (4)*.

Moreover, the Commission wholly *failed to make essential findings* in this Section 5 proceeding, "public interest" being the criteria and standard required, contrary to its long standing policy as shown by its own decisions, hence its order is condemned by Section 8(b), *5 U.S.C. 1007(b)*; and the Court below, apparently completely oblivious of the Administrative

Procedure Act and of Sections 8(b) and 10(e) in particular, perpetuates, frustrates and nullifies the Congressional intent and purposes to keep the Commission within defined statutory standards. Congress had as well have saved its time and effort and have allowed to the Commission carte blanc authority and provided for no judicial review.

But *the basic findings* in the context here presented and urged *must be made.* The Administrative Procedure Act so requires and the courts so demand. *Alabama Great S.R.Co. vs. United States,* 340 U.S. 216, and authority cited at page 228.

Fourth, the Court below then goes out on its own and decides for itself that the criteria of Section 207, *49 U.S.C. 307,* is the applicable criteria, saying:

> "The *most important issue* involved in this case *is not whether* the protestants showed that an unrestricted approval of the acquisition by Braswell would have a materially adverse effect on their operations *but whether Braswell proved a public need for the new service.* The finding of the Commission that it failed to do so is supported by substantial evidence." (Emphasis supplied) (101 M.C.C. 1, 17) (Juris.Stmt., Appendix A, pages A-7 and A-8).

This finding is simply untrue. There is no substantial evidence to support it. The facts are that appellants presented 70 shippers and receivers on the witness stand. These witnesses testified to a need for the service. We have called attention to this heretofore. The use made of the service, which so startled the

Commission, strongly showed the need for the service. We have called attention to this heretofore and cited Commission decisions so saying. The Commission and the Court below chose to wholly ignore these facts. May they do so with impunity? See the Examiner's discussion as to these witnesses. (Juris.Stmt., Appendix C, pages 27-C through 30-C).

Well, irrespective of that holding by the Court below, the issues and the required material findings are fixed by Section 5(c); *49 U.S.C. 5(c)*, and the overriding National Transportation Policy. Nor can this be successfully controverted.

THE MOTIONS TO DISMISS OR AFFIRM

We feel that the foregoing background, interspersed with argument, is essential to proper consideration and determination of the motions to affirm and that to dismiss.

With that background, we may now more intelligently approach the validity of said motions, or the lack of it. For, as we pointed out almost at the very beginning hereof, the basic findings essential to the validity of a given order will vary with the statutory authority involved and the context of the situation presented.

This brings us to a consideration of the appellees' interpretations or misinterpretations of the questions presented.

The United States and the Interstate Commerce Commission say that "Appellants do not challenge the

standard of judicial review which the court below applied," and cite *Rochester Telephone Corp. vs. United States*, 307 U.S. 125, 138-140.

What kind of nonsense is this?

In *Rochester Telephone Co.*, supra, this Court mentions that the Court has evolved two specific doctrines, one, that of "primary jurisdiction," the other, the doctrine of "administrative finality." The doctrine of primary jurisdiction is not here involved. The doctrine of administrative finality is directly involved and the judgment of the court below is challenged.

Administrative finality restricts the range of the Court's review, but even so there are questions involved, as said in *Rochester Telephone Corp.*, supra, the questions being those (1) affecting constitutional power; (2) statutory authority; and (3) the basic prerequisites of proof.

Statutory authority not only involves Sections 5(2)(a)(i), 5(2)(b) and (c), *49 U.S.C. 5(2)(a)(i)* and *5(2)(b) and (c)*, but also equally involved are Sections 8(b) and 10(e) of the Administrative Procedure Act, *5 U.S.C. 1007(b) and 1009(e)*, and the National Transportation Policy.

In this respect note the extent to which the Court below determined the case based upon the statutory criteria of Section 207, *49 U.S.C. 307*, where the Court said "The most important issue involved in this case is . . . whether Braswell proved a public need" etc. See Juris.Stmt., page 10, the quote. That is literally a desertion of the statutory criteria of Section 5(2)(b)

and (c), *49 U.S.C. 5(2)(b)* and *(c)*, and the substitution by the Court below of the statutory criteria of Section 207, which is not within the power or authority of the Court below. The standard of judicial review, as well as of the Commission, is challenged in every question presented (Juris.Stmt., pages 11-12).

While, as we have heretofore admitted, the right of judicial review is limited, nevertheless the Court has authority, indeed the duty, to keep the Commission within the bounds of its constitutional and statutory authority and this requires, in fact demands, that the Court determine whether or not the Commission has (1) applied the proper statutory criteria and (2) has properly observed the limitations and restrictions put upon the Commission by the Administrative Procedure Act.

For "Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body." *Federal Communications Commission vs. R.C.A. Communications, Inc.*, 346 U.S. 86, 90.

The Commission must exercise power, and courts must so require, within the limits of the several statutes to which we have referred. And this includes not only the application of the criteria prescribed by Congress but also within the restrictive limitations of the Administrative Procedure Act.

In connection with appellants' insistence that the Commission applied the wrong statutory criteria, the United States and Interstate Commerce Commission say that the question has been raised but rejected in

a number of cases. Well, it was not raised in *Great Coastal Express, Inc. vs. United States,* 243 Fed.Supp. 943, for which it was cited; and it was not effectively raised in *Ratner vs. United States,* 162 Fed.Supp. 518, because the *Commission had found* that entry of applicant into the area in question would disrupt the competitive balance with harmful effect on competing carriers *without compensatory benefits to the public.* Thus *the necessity for an essential finding* is admitted but no such, or similar, finding was made by the Commission in this case.

We have heretofore pointed out that the basic findings essential to the validity of an order *will vary* with the *statutory authority* involved and the *context of the specific situation presented.* It is a situation varying from case to case. In our case here there is no corresponding finding.

Neither *Shein vs. United States,* 102 Fed.Supp. 320, nor any of the other cases cited by the United States and the Interstate Commerce Commission have anything to do with the situation here presented.

In *Shein,* supra, the action of the Commission was attacked as being arbitrary, capricious and not founded upon substantial evidence; and a question of burden of proof. No question was raised as to applicable statutory criteria or in connection with the Administrative Procedure Act.

The United States and the Interstate Commerce then say that "Appellants' other basic contention is that the Commission committed reversible error (1) in

not giving controlling weight to the revenues, tonnage and operating ratios of protestants" etc. Motion to Affirm, page 6. Well, call it controlling effect or what you like, the contention is that the revenues, tonnage and operating ratios referred to condemn the finding of the Commission that: "In our opinion the record here is clear that approval of the instant transaction would have a substantial adverse effect upon existing carriers" etc. Juris.Stmt., Appendix B, page B-27.

The fact is that the finding, as shown by the revenues, tonnages and operating ratios, with the competitive operations of Braswell, show beyond peradventure of doubt that there was no "substantial adverse effect upon existing carriers." The finding, in the light of actual experience, is not supported by substantial evidence *and* the order is void under Section 10(e) of the Administrative Procedure Act.

The group of intervenor-appellees, other than Transcon Lines, says that that the sole question presented is whether the restrictions imposed are "in accordance with applicable principles of law, as set forth in prior decisions of the Commission and the courts."

We do not agree.

The principles set forth by the Commission in *Pacific Intermountain Express—Control and Purchase —Keeshin Freight Lines, Inc.*, 57 M.C.C. 467, are the principles, criteria or standards established by Congress in Section 5(2)(b) and (c) of the Interstate Commerce Act and attempted by Congress to be made secure in the National Transportation Policy.

True there have been varying decisions by the courts but these have gone off on other points. This is why, in the very beginning of this reply, we pointed out that the basic findings essential to the validity of a given order will vary with the statutory authority invoked and the context of the situation presented, citing *Alabama Great S.R. Co. vs. United States*, 340 U.S. 216, 228, and other Supreme Court decisions there cited.

The Commission has not departed from the principles laid down as to the essential and basic findings which "We must" make in a Section 5(2)(a) proceeding except as the Commission here wholly failed to make all of the "We must" findings; nor have the courts done so.

The Commission must make all of the essential findings, just as it has said, and failure to do so voids the order under Section 8(b) of the Administrative Procedure Act. The Commission has not done so.

This is the very reason why this Honorable Court first remarked in *State of New York, et al vs. United States, Interstate Commerce Commission, et al*, 342 U.S. 882, 884, and repeated in *Burlington Truck Lines vs. United States*, 371 U.S. 156, 167:

> "Unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion. Absolute discretion, like corruption, marks the beginning of the end of liberty. This case is perhaps insignificant in the annals. But

the standards set for men of good will is even more useful to the venal."

Turning now to the motion to dismiss as filed on behalf of Transcon Lines, it may first be said that it is of no consequence and could as well be ignored. Transcon Lines' motion misses the case completely.

It says that the question is "whether (in) a unification proposed under Section 5(2), . . . is or is not consistent with the public interest, is the Commission without authority to condition its approval so as to prohibit authorization of new competitive services not shown to be required by the public need."

That question, not here involved, is purely academic.

We think that it can be. But certain it is that unless the Commission applies proper criteria and unless the Commission complies with Section 8(b), Administrative Procedure Act, and the National Transportation Policy *and makes* the necessary and essential findings, it cannot so condition its approval. Moreover, unless the Commission does these things, its order is void under Section 10(e), Administrative Procedure Act.

It is as simple as that. The order here is void.

IN GENERAL

What the Commission here, and also all counsel for all appellees, has forgotten is the requirement for basic findings.

In relation to this requirement we have discussed the deficiencies of the order here under review in

detail. In the light of *Pacific Intermountain Express—Control—Keeshin*, supra, we have pointed out very clearly the lack of essential findings, non-compliance with statutory criteria, violations of provisions of the Administrative Procedure Act, and other deficiencies of the order. We have pointed out that the Court below never at any time seemed to acknowledge the existence of the National Transportation Policy or of the Administrative Procedure Act.

But the requirement that courts, and commissions acting in a quasi-judicial capacity, shall make findings of fact is a means provided by Congress for guaranteeing that cases such as this one shall be decided according to the evidence and the law, rather than arbitrarily or from extralegal considerations.

Section 8(b), Administrative Procedure Act, is the guaranteeing statute. Section 10(e) of the Administrative Procedure Act nullifies an order if Section 8(b) is not complied with. As said in *Commonwealth of Puerto Rico vs. Federal Maritime Boards*, 288 Fed. 2d 419:

> "The Administrative Procedure Act requires all decisions to state not only findings and conclusions, but also 'the reasons or basis therefor, upon *all* material issues of fact, law or discretion presented on the record . . .'" See *Secretary of Agriculture vs. United States*, 347 U.S. 645; *U.S. vs. Chicago M. St. P. & P.R.Co.*, 294 U.S. 499.

We cited *Florida vs. United States*, 282 U.S. 194, in our Jurisdictional Statement and now point out that what was there said has become settled doctrine in the federal courts. In *Colorado-Wyoming Co. vs. Federal*

Power Commission, 324 U.S. 626, 634, this Honorable Court said:

> "But we must first know what the 'finding' is before we can give it that conclusive weight. We have repeatedly emphasized the need for clarity and *completeness* in the basic or essential findings on which administrative orders rest."

We have here pointed out the utter lack of completeness of basic findings based upon what the Commission acknowledges and said in *Burlington Truck Lines vs. United States*, supra, that "we must" consider. Likewise we have pointed out the lack of *any* substantial evidence to support the findings made.

PRAYER

Appellants earnestly contend that the order here under review is void for all of the deficiencies pointed out and that the motions to affirm and the one to dismiss are without merit, and pray that said motions be overruled and that this Court note jurisdiction.

Respectfully submitted,

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PROOF OF SERVICE

I, T. S. Christopher, one of the attorneys for appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 30th day of December, 1967, I served copies of the foregoing Reply to Motions to Dismiss and to Affirm on the several parties to this action as follows:

1. On the United States, by mailing copies thereof, in duly addressed envelopes, postage prepaid, to Hon. Erwin N. Griswold, Solicitor General, Department of Justice, Washington, D. C. 20530; to Hon. Donald F. Turner, Assistant Attorney General, Department of Justice, Washington, D. C. 20530; to Hon. Gregory B. Hovendon, Attorney, Department of Justice, Washington, D. C. 20530; and to Hon. Seymour H. Dussman, Attorney, Department of Justice, Washington, D. C. 20530.

2. On the Interstate Commerce Commission, by mailing copies thereof, in duly addressed envelopes, postage prepaid, to Hon. Robert W. Ginnane, General Counsel, Interstate Commerce Commission, Washington, D. C. 20423, and to Hon. Emmanuel H. Smith, Attorney, Interstate Commerce Commission, Washington, D. C. 20423.

3. On the Attorneys for other appellees herein, by mailing copies thereof, in duly addressed envelopes, postage prepaid, to David Axelrod, Esq., Axelrod, Goodman & Steiner, 39 South LaSalle Street, Chicago, Illinois 60603; to Bruce Hallmark, Esq., Goodman and Hallmark, Suite 13A, El Paso National Bank Build-

ing, El Paso, Texas 79901; to Wentworth E. Griffin, Esq., Reeder, Griffin & Dysart, 812 Midland Building, 1221 Baltimore Street, Kansas City, Missouri 46105; and to Phillip Robinson, Esq., James, Robinson, Felts & Starnes, The 904 Lavaca Building, Austin, Texas 78701.

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Attorney

APPENDIX A

Exhibit No. H-54
Witness .....

Abstract showing list of carriers, total operating revenue, tonnage handled, and operating ratio. Source of obtaining information was *CARRIER REPORTS* Annual and Quarterly reflecting information filed by Carriers annually and quarterly with the Interstate Commerce Commission. Periods covered are 1959, 1960, 1961, 1962 and the 1st and 2nd Quarters of 1963.

Stricken except as to carriers protestants in this proceeding.

CARRIERS	1959			1960			1961			1962		
	Revenue	Tonnage	Operating Ratio	Revenue	Tonnage	Operating Ratio	Revenue	Tonnage	Operating Ratio	Revenue	Tonnage	Operating Ratio
Arkansas-Best Freight System	14334	457	93.9	14495	455	96.5	15895	428	92.0	16855	503	91.5
Be-Mac Transport Company	6008	255	94.3	5962	236	98.3	6559	242	91.7	7054	267	91.5
Campbell Sixty-Six Express	15800	598	90.6	16662	629	93.3	18028	648	91.5	18331	637	92.3
Consolidated Forwarding	7309	257	96.1	7433	251	98.3	8316	274	93.9	9083	300	94.8
Consolidated Freightways, Inc.	78390	4630	96.7	99863	4866	99.1	86793	4907	97.0	85215	5217	98.9
Delta Motor Lines, Inc.	8748	351	97.0	8019	310	101.2	8557	325	97.9	8208	319	101.8
Denver Chicago Trucking Co.	39704	621	91.8	40592	638	90.3	42259	654	90.1	43838	672	91.1
East Texas Motor Freight Lines	16117	467	92.2	15712	452	95.1	17483	487	98.9	19157	530	91.3
Frisco Transportation Company	3280	156	105.0	3081	129	98.1	3088	128	97.5	3058	133	100.6
Garrett Freightlines	17900	469	89.4	18229	476	93.0	29770	935	91.4	31151	943	93.5
Gillette Motor Transport	6636	227	89.1	6548	222	97.4	7146	242	97.3	8003	276	94.3
Gordons Transports, Inc.	16963	623	93.9	17063	632	98.1	20775	725	96.9	23523	784	95.9
Illinois-California Express	15705	290	88.5	25266	640	93.1	26046	546	92.6	27434	564	92.6
Interstate Motor Lines	20074	374	86.3	20427	382	91.2	23848	427	85.9	26244	465	88.4
Jones Truck Lines, Inc.	7967	358	94.5	9234	420	95.6	9698	433	92.6	10465	458	90.9
Knaus Truck Lines	5902	217	107.8	5599	206	114.6	See Missouri Consolidated for 1961 and 1962.					
Leeway Motor Freight Lines	12678	464	89.7	12205	445	98.8	16148	533	96.7	16435	539	95.8
Mid-Continent Freight	4091	112	107.5	2030	—	113.9	2952	74	96.9	3657	87	98.9
Missouri Consolidated	See Knaus Truck Lines for 1959 and 1960.						4044	135	111.7	4290	126	88.3

Add 000 to all Columns (except operating ratio)

CARRIERS	1959			1960			1961			1962		
	Revenue	Tonnage	Operating Ratio	Revenue	Tonnage	Operating Ratio	Revenue	Tonnage	Operating Ratio	Revenue	Tonnage	Operating Ratio
Missouri Pacific Freight Transport	5244	356	101.7	5741	337	99.0	6083	344	99.4	6174	358	98.7
Navajo Freight Lines	26571	578	91.2	27870	582	97.7	28820	636	95.3	30248	609	97.2
Pacific Intermountain Express	62517	2993	94.4	58304	2704	97.2	60215	2570	94.3	65499	2721	94.0
Ringsby Truck Lines	16422	335	98.7	17163	379	97.0	19041	400	95.0	20772	438	95.3
Roadway Express	65510	1543	93.1	70719	1639	92.2	78106	1748	91.9	88716	1929	90.6
Ryder Truck Lines of Missouri (Southern Plaza)	11581	379	100.4	11130	358	104.8	11010	340	99.6	11039	342	106.9
Southwestern Transportation Co.	7416	333	91.1	7205	323	93.7	7148	290	95.6	7984	298	98.9
Strickland Transportation Co.	11347	352	94.8	13485	407	96.3	15035	461	96.4	Not Available		
Texas-Arizona Motor Freight	6902	154	88.8	7316	161	96.4	6808	145	92.8	7081	144	95.5
T.I.M.E. Freight, Inc.	18516	449	93.4	16546	383	95.6	17420	383	92.4	19392	408	90.5
Transamerican Freight Lines	42686	1506	98.2	43301	1517	99.6	43750	1484	98.9	44818	1540	98.0
Transcon Lines	19347	355	90.8	22570	452	94.9	23978	460	90.8	26519	470	87.1
Viking Freight Company	14313	511	94.3	14308	518	97.1	15545	545	94.4	17774	605	96.6
Voss Truck Lines	2405	77	95.4	2227	73	98.8	2384	79	92.6	2779	100	95.5
Watson Bros. Transportation Co.	41097	1128	96.6	38139	1030	100.4	50039	1376	98.3	48697	1226	103.5
Western Truck Lines	12686	391	97.0	13202	388	100.4	13900	395	99.4	14933	405	99.3
Wilson Truck Co.	11394	354	93.6	11035	342	95.4	Included with Watson Bros. for 1961 and 1962.					
Yellow Transit Freight Lines	31339	1207	92.6	31061	1223	95.7	25847	944	93.0	28744	1025	86.7

Add 000 to all Columns (except operating ratio)

CARRIERS	1st Quarter (1963) REVENUE	TONNAGE	OPERATING RATIO	2nd Quarter (1963) REVENUE	TONNAGE	OPERATING RATIO
Arkansas-Best Freight System	4103	125	94.8	4558	138	89.0
Be-Mac Transport Company	1734	65	95.2	1829	70	91.7
Campbell Sixty-Six Express	4384	151	97.3	4909	172	89.5
Consolidated Forwarding	2268	74	94.8	2468	81	92.7
Consolidated Freightways, Inc.	28520	1190	103.3	30058	1162	98.8
Delta Motor Lines, Inc.	1661	64	117.1	1714	67	112.2
Denver Chicago Trucking Company	10720	162	93.6	11340	167	90.1
East Texas Motor Freight Lines	4891	135	94.0	5301	147	90.7
Frisco Transportation Company	657	23	107.2	706	24	103.0
Garrett Freightlines	7656	226	93.6	8351	240	90.6
Gillette Motor Transport	1939	67	89.5	2118	73	94.2
Gordons Transports, Inc.	5140	166	101.7	5421	175	97.4
Illinois-California Express	6805	133	97.7	7218	143	94.2
Interstate Motor Lines	6660	118	92.4	8302	168	90.5
Jones Truck Lines, Inc.	2639	117	92.7	2830	123	93.3
Leeway Motor Freight Lines	3984	131	98.5	4359	147	94.9
Mid-Continent Freight	911	22	99.7	983	24	96.2
Missouri Consolidated	1256	36	91.1	1404	37	88.5

Add 000 to all Columns (except operating ratio)

CARRIERS	1st Quarter (1963) REVENUE	TONNAGE	OPERATING RATIO	2nd Quarter (1963) REVENUE	TONNAGE	OPERATING RATIO
Missouri Pacific Freight Transport	1740	94	100.7	1835	104	98.5
Navajo Freight Lines	7028	124	98.9	7601	136	96.2
Pacific Intermountain Express	16063	666	97.2	16909	689	93.6
Ringsby Truck Lines	4964	104	95.9	5517	110	95.2
Roadway Express	20389	440	93.8	22638	489	89.3
Ryder Truck Lines of Missouri (Southern Plaza)	2563	82	112.8	2583	82	107.4
Southwestern Transportation Co.	1913	71	99.5	2135	79	94.8
Strickland Transportation Co.	3439	100	101.2	3895	116	97.8
Texas-Arizona Motor Freight	1813	37	94.5	1833	37	94.8
T.I.M.E. Freight, Inc.	5124	105	92.9	5391	109	89.7
Transamerican Freight Lines	9824	333	102.7	11320	391	94.0
Transcon Lines	6792	113	88.8	7669	123	85.6
Viking Freight Company	4330	145	99.8	4714	156	93.5
Voss Truck Lines	700	25	111.8	795	29	100.1
Watson-Wilson Transportation System	9923	255	105.6	9092	208	99.8
Western Truck Lines	3826	103	91.9	3841	105	96.1
Yellow Transit Freight Lines	7685	274	86.9	8802	320	83.2

Add 000 to all Columns (except operating ratio)